(5)

Supreme Court, U.S.
FILED
JUN 3 1993
OFFICE OF THE CLERK

NO. 91-1950

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

AMERICAN DREDGING COMPANY
Petitioner,

vs.

WILLIAM ROBERT MILLER
Respondent.

On Writ of Certiorari to
The Supreme Court of The State of Louisiana

JOINT APPENDIX

THOMAS J. WAGNER*
WHITNEY L. COLE
Suite 250 - C & R Building
336 Camp Street
New Orleans, Louisiana
70130-2804
Telephone No.:
(504) 525-2141
and
WAGNER, BAGOT & GLEASON
Attorneys for American Dredging Company

TIMOTHY J. FALCON*
500 Verret Street
New Orleans, Louisiana 70114
Telephone No.: (504) 366-6642
Attorney for
William Robert Miller

*Counsel of Record

PETITION FOR CERTIORARI FILED MAY 29, 1992
CERTIORARI GRANTED APRIL 19, 1993

Pel Hughes Printing, Inc., 134 Carondelet St., New Orleans, LA (504) 523-2618

BEST AVAILABLE COPY

70 pp

TABLE OF CONTENTS

PAGE

RELEVANT DOCKET ENTRIES 1

COMPLAINT, FILED DECEMBER 1, 1989 7

EXCEPTIONS OF LACK OF JURISDICTION *IN PERSONAM* AND, ALTERNATIVELY, *FORUM NON CONVENIENS*, FILED APRIL 25, 1990 10

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S EXCEPTION OF LACK OF JURISDICTION *IN PERSONAM* AND, ALTERNATIVELY, *FORUM NON CONVENIENS*, FILED JUNE 20, 1990 31

DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF EXCEPTION OF LACK OF JURISDICTION *IN PERSONAM* AND *FORUM NON CONVENIENS*, FILED SEPTEMBER 18, 1990 43

JUDGMENT OF CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA INCLUDING REASONS FOR JUDGMENT DATED SEPTEMBER 28, 1990 49

DECISION OF LOUISIANA FOURTH CIRCUIT COURT OF APPEAL, STATE OF LOUISIANA DATED MAY 30, 1991 53

DECISION OF LOUISIANA SUPREME COURT DATED MARCH 2, 1992 58

RELEVANT DOCKET ENTRIES

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 89-25877 ***DIVISION "E"***

WILLIAM R. MILLER, SR.
versus
AMERICAN DREDGING COMPANY

1. Complaint, filed December 1, 1989.

2. Defendant's Exceptions Of Lack Of Jurisdiction *In Personam* And, Alternatively, *Forum Non Conveniens*, filed April 25, 1990.

3. Defendant's Supplemental Memorandum In Support Of Exceptions Of Lack Of Jurisdiction *In Personam* And *Forum Non Conveniens*, filed May 8, 1990.

4. Plaintiff's Memorandum In Opposition To Defendant's Exceptions Of Lack Of Jurisdiction *In Personam* And, Alternatively, *Forum Non Conveniens,* filed June 20, 1990.

5. Defendant's Supplemental Memorandum In Support Of Exceptions Of Lack Of Jurisdiction *In Personam* And *Forum Non Conveniens*, filed September 18, 1990.

6. Reasons For Judgment, dated September 25, 1990.

7. Judgment Denying Exception Of Lack Of Jurisdiction *In Personam*, But Granting The Exception Of *Forum Non Conveniens*, rendered September 28, 1990.

8. Plaintiff's Motion For Suspensive Appeal, filed October 26, 1990.

9. Notice Of Order Granting Suspensive Appeal, entered November 6, 1990.

10. Plaintiff's Motion To Set For Trial On The Merits, filed April 29, 1992.

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA
DOCKET NO. 90-CA-2175

WILLIAM R. MILLER
versus
AMERICAN DREDGING COMPANY

ON APPEAL FROM

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA
NO. 89-25877 "E"
JUDGE FEDOROFF

11. Original Brief On Behalf Of William R. Miller, Sr., Plaintiff/Appellant, filed January 18, 1991.

12. Brief On Behalf Of American Dredging Company, Defendant/Appellee, filed February 27, 1991.

13. Oral Argument May 6, 1991.

14. Decision Affirming The Judgment Of The Trial Court, rendered May 30, 1991. (Court Composed of Judges Robert J. Klees, Robert L. Lobrano and Charles R. Ward).

SUPREME COURT
STATE OF LOUISIANA
DOCKET NO. 91-C-1524

WILLIAM ROBERT MILLER,
Plaintiff/Appellant, Petitioner

vs.

AMERICAN DREDGING COMPANY
Defendant/Appellee, Respondent

ON WRIT OF REVIEW OF THE COURT OF APPEAL
FOURTH CIRCUIT, NO. 90-CA-2175;
CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
HONORABLE GERALD P. FEDOROFF,
JUDGE PRESIDING, NO. 89-25877

15. Plaintiff's Application For A Writ Of Certiorari And For Supervisory Writ And/Or Writs To Review A Judgment Of The Fourth Circuit Court Of Appeal Of The State Of Louisiana, filed June 28, 1991.

16. Respondent's Brief In Opposition To Application For A Writ Of Certiorari And For Supervisory Writs And/Or Writs To Review A Judgment Of The Fourth Circuit Court Of Appeal Of The State Of Louisiana, filed September 10, 1991.

17. Motion Of Louisiana Trial Lawyers Association To File *Amicus Curiae* Brief, filed October 3, 1991. Granted October 3, 1991.

18. Notice Of Interest Of International Shipping Federation And International Chamber Of Shipping And Request To Appear As *Amici Curiae* In Support Of The Judgment Of The Court Of Appeal, filed October 10, 1991. Granted October 11, 1991.

19. Brief Of *Amicus Curiae*, Louisiana Trial Lawyers Association, In Support Of Plaintiff's Application For Certiorari, filed October 14, 1991.

20. Order Granting Plaintiff's Application For A Writ Of Certiorari And/Or Review, signed October 18, 1991.

21. Original Brief On The Merits Filed On Behalf Of William Robert Miller, Sr., Plaintiff/Appellant/Petitioner, filed November 22, 1991.

22. Brief Of *Amici Curiae*, International Shipping Federation And International Chamber Of Shipping In Support Of The Decision Of The Court Of Appeal, Fourth Circuit, filed December 13, 1991.

23. Brief Of *Amicus Curiae*, Maritime Law Association Of The United States In Support Of Respondent, And Order Granting Motion To File Same, filed December 23, 1991. Granted December 23, 1991.

24. Original Brief On The Merits On Behalf Of American Dredging Company, Defendant/Appellee/Respondent, filed December 23, 1991.

25. Motion To Allow Counsel For *Amici Curiae*, International Shipping Federation And International Chamber Of Shipping To Share Respondent's Oral Argument Time, filed January 7, 1992. Granted January 8, 1992.

26. Oral Argument January 21, 1992.

27. Opinion And Decree Reversing The Judgment Of The Court Of Appeal, rendered March 2, 1992.

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 89-25877 DIVISION: "E"

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

COMPLAINT

NOW INTO COURT, through undersigned counsel, comes the Complainant, WILLIAM R. MILLER, SR., a competent major and citizen of the United States, and respectfully shows:

I

This is an admiralty and maritime claim being brought pursuant to Section 33 of the Merchant Marine Act, more commonly known as the Jones Act (46 U.S.C. Section 688), the General Maritime Law for unseaworthiness and for wages, maintenance and cure.

II

At all times hereinafter mentioned, the defendant, AMERICAN DREDGING COMPANY, owned, operated, manned, managed, provisioned and/or controlled and/or had possession of the M/V JOHN R.

III

At all times hereinafter mentioned, complainant was

employed by the defendant in the capacity of a seaman and member of the crew of the M/V JOHN R.

IV

On December 12, 1987, complainant, while in the course of his employment and while in the performance of his duties, because of the unsafe and unseaworthy condition of the aforesaid M/V JOHN R, its gear, appurtenances, crew and unsafe working conditions, and because of the negligence of the defendants and/or their agents and/or employees, was caused to sustain severe injuries to his back, neck or other parts of his body.

V

The proximate cause of complainant's injuries was the negligence of the defendants and/or their employees and/or agents.

VI

Complainant has suffered the following non-exclusive damages for which he is entitled to compensation that is reasonable in the premises:

a) Past, present and future pain and suffering;

b) Past, present and future emotional distress and mental anxiety;

c) Past, present and future lost wages;

d) Past, present and future maintenance, cure and wages;

VII

Further, complainant is entitled to punitive damages and attorney fees for the defendant's wanton and callous refusal to pay maintenance, cure and wages.

VIII

Complainant is entitled to and hereby requests a trial by jury of all issues asserted herein.

WHEREFORE, plaintiff prays that after due proceedings are had, there be judgment herein in his favor and against the defendant, AMERICAN DREDGING COMPANY, in such amount as is reasonable in the premises, with legal interest thereon from date of judicial demand and all costs of these proceedings.

STEGEMAN & FALCON

/s/ Timothy J. Falcon
TIMOTHY J. FALCON, NO. 16909
Attorney for Plaintiff
425 Weyer Street
Gretna, LA 70053
Bar No. 16909
Telephone (504) 368-0123
Telecopier (504) 366-3753

* * *

[Service Instructions Omitted in Printing]

* * *

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 89-25877 DIVISION: "E"

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED: _____
DEPUTY CLERK

EXCEPTIONS OF LACK OF JURISDICTION IN PERSONAM AND, ALTERNATIVELY, FORUM NON CONVENIENS

NOW INTO COURT, through undersigned counsel, comes defendant, American Dredging Company, and excepts to this Court's jurisdiction in personam and, alternatively, to the exercise of its jurisdiction on the basis of forum non conveniens for the reasons cited in the attached memorandum.

/s/ N. Eleanor Graham
Thomas J. Wagner (13143)
N. Eleanor Graham (16946)
336 Camp Street
Suite 250, C & R Building
New Orleans, Louisiana 70130-2804
Telephone: (504) 424-2141
and
WAGNER & BAGOT
Attorneys for Defendant, American Dredging Company

CERTIFICATE OF SERVICE

I, the undersigned authority, hereby certify that I have this date forwarded a copy of the above and foregoing pleading to all counsel of record this 25th day of April, 1990.

/s/ N. Eleanor Graham

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E"

WILLIAM R. MILLER, SR.

VERSUS

AMERICAN DREDGING COMPANY

FILED:_____ _____
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF EXCEPTIONS OF LACK OF JURISDICTION IN PERSONAM AND FORUM NON CONVENIENS

MAY IT PLEASE THE COURT:

FACTUAL SUMMARY

Plaintiff, William Robert Miller, Sr., brought this action against his employer, American Dredging Company ("ADC"), pursuant to the Jones Act, 46 U.S.C. § 688, and the general maritime law. The accident giving rise to this action allegedly occurred on December 12, 1987 while plaintiff was aboard the Tug JOHN R in the Delaware River off Marcus Hook, Pennsylvania. See plaintiff's petition.

At the time of the alleged accident plaintiff was a Delaware resident. Upon information and belief plaintiff is a Mississippi resident.

ADC is a Pennsylvania corporation that specializes in dredging water bodies. It has no office or corporate representative in Louisiana. ADC has no property or bank accounts in Louisiana. It has not done any dredging business in Louisiana since 1983. Although ADC has a registered agent for service of process in New Orleans, ADC did not engage this agent in order to subject itself to suits by nonresidents of Louisiana as a result of actions entirely unrelated to Louisiana. The sole purpose of ADC's Louisiana registered agent is to comply with an Army Corps of Engineers requirement should ADC ever submit a bid on dredging projects in Louisiana. Plaintiff's action neither arises out of nor relates to ADC's limited contacts with Louisiana.

All potential fact witnesses to the alleged accident were last known to be residing in the New York area. The majority of plaintiff's medical treatment resulting from the alleged accident occurred near Philadelphia, Pennsylvania and in New York. Accordingly, the vast majority of medical witnesses and records are in Pennsylvania and New York.

The Tug JOHN R, which at all material times was owned and operated by ADC, will be available for inspection in Camden, New Jersey. The Tug JOHN R does not and has never navigated in Louisiana.

Louisiana has no connection to or interest in the action between a Mississippi resident and a Pennsylvania corporation, arising from an alleged accident in the Delaware River.

II. ARGUMENT

I. EXCEPTION OF LACK OF JURISDICTION IN PERSONAM

A. A FORUM MAY EXERCISE GENERAL IN PERSONAM JURISDICTION OVER A NON-RESIDENT ONLY IF IT HAS "CONTINUOUS AND SYSTEMATIC" CONTACTS WITH THE FORUM.

A Louisiana court's exercise of personal jurisdiction over a nonresident is determined by the Louisiana Long-Arm Statute. La. R.S. 13:3201. The Long-Arm Statute provides in pertinent part:

> A. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:
>
> (1) Transacting a business in this state.
>
> ...
>
> B. In addition to the provision of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.

Louisiana courts have consistently held that the valid application of the Louisiana Long-Arm Statute and exercise of personal jurisdiction over a nonresident require a sufficient nexus between the nonresident and Louisiana so as not to offend federal

due process requirements. See, e.g., American Bank and Trust Company v. Sunbelt Environmental Systems, Inc., 451 So.2d 1111 (La. App. 1st Cir. 1984); Cambre v. St. Paul Fire & Marine Insurance Company, 331 So.2d 585 (La. App. 1st Cir. 1976); Grinnell v. Garrett, 295 So.2d 496 (La. App. 3d Cir. 1974).

It is well settled that the Due Process Clause of the Fourteenth Amendment of the United States Constitution operates to limit the power of a state to assert in personam jurisdiction over a nonresident defendant. Pennoyer v. Neff, 95 U.S. 714 (1878). When in personam jurisdiction is asserted over a nonresident corporate defendant, due process requires that the defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend `traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 457, 463, 61 S. Ct. 339, 342 (1940). A state's exercise of personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum is an exercise of "general jurisdiction" over the defendant. See Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 407, 413, 104 S. Ct. 1868, 1972 n. 9 (1984).[1] In order to exercise general jurisdiction over a nonresident corporation, the foreign corporation is not amenable to a state's general in personam jurisdiction unless it has "continuous and systematic" general business contacts with the forum state. Id. at 1872-73; Perkins v. Benguet Consolidated Mining Company, 342 U.S. 437, 72 S. Ct. 413 (1952).

---

[1] The United States Supreme Court now distinguishes two types of personal jurisdiction - "general jurisdiction" and "specific jurisdiction." The exercise of "specific jurisdiction" occurs only when the action arises out of or relates to the defendant's contacts with the forum state. The issue before this court is Louisiana's right to exercise "general jurisdiction" over ADC since plaintiff's action neither arises out of nor is related to ADC's limited contacts with Louisiana.

B. THE DUE PROCESS CLAUSE MANDATES THAT PLAINTIFF'S ACTION BE DISMISSED.

In the instant case, a Louisiana court is constitutionally prescribed from exercising general in personam jurisdiction over ADC because ADC does not have "continuous and systematic" general business contacts with Louisiana. ADC does not have any office, corporate representative, bank accounts or property in the state of Louisiana. ADC has not done any dredging work in Louisiana since 1983. Id. ADC has maintained a registered agent in Orleans Parish to preserve its right to bid on Army Corps of Engineers projects. However, maintaining one's license to do business in a forum does not amount to the "continuous and systematic" general business contacts required to subject a nonresident corporation to the general in personam jurisdiction of the forum. See Helicopteros and Perkins, supra.

It would clearly offend the constitutional mandate of due process for this Court to exercise general in personam jurisdiction over ADC in this action. Such paucity of contacts between a foreign corporation and a state do not constitutionally support the exercise of in personam jurisdiction by a court in the forum state. See, e.g., Helicopteros, supra (holding that a Texas state court could not assert general in personam jurisdiction over a foreign corporation where that corporation's contacts with Texas were limited to one trip to Texas by the corporation's CEO, the corporation's acceptance of checks drawn on a Texas bank, purchases of helicopters and equipment from Texas manufacturers, and related training trips); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 43 S. Ct. 170 (1923) (holding that purchases and related trips of a small Oklahoma retail store from New York wholesalers were insufficient to warrant the assertion of New York's in personam jurisdiction over the Oklahoma

retailer as it had never established a place of business in New York and never regularly carried on business in New York). The nature and extent of business contacts required by the due process clause to support the exercise of general in personam jurisdiction are best exemplified by Perkins, supra. In Perkins, the Supreme Court found that a Philippine corporation, through its president, had carried on "continuous and systematic" general business contacts with Ohio supporting the exercise of general jurisdiction over the corporation there. Those business contacts included the maintenance of an office in Ohio's directors' meetings in Ohio; two Ohio bank accounts; distributing salary checks in Ohio; and the appointment of an Ohio bank to act as transfer agent. In contrast to the foreign corporation's Ohio forum contacts in Perkins, ADC's contacts with Louisiana are patently insufficient to satisfy due process requirements. Accordingly, plaintiff's action should be dismissed for lack of in personam jurisdiction.

II. EXCEPTION OF FORUM NON CONVENIENS

A. THE DOCTRINE OF FORUM NON CONVENIENS IS AN INTEGRAL PART OF THE GENERAL MARITIME LAW THAT MUST BE APPLIED BY LOUISIANA STATE COURTS UNDER THE FEDERAL UNIFORMITY DOCTRINE.

Plaintiff brought this admiralty action pursuant to the 'Savings to Suitors' clause. 28 U.S.C. § 1333(1). Accordingly, maritime law as interpreted by the federal courts applies. See Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 322 (5th Cir. 1987), reversed on other grounds, _____ U.S. _____, 108 S. Ct. 1684 (1988).

Forum non conveniens is a jurisprudentially created maritime doctrine that must be applied by state courts when properly raised as a defense. Id. at 329. The principle of forum non conveniens is simply "[t]hat a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507, 63 S. Ct. 246, _____ (1942). When state courts entertain in personam maritime causes of action, such as in the case at bar, "the substantive remedies afforded by the State [must] conform to governing maritime standards." Choo at 316; Garrett v. Moore-McCormack Co., 317 U.S. 239, 63 S. Ct. 246 (1942); see also Lavergne v. Western Co. of N. Amer., Inc., 371 So.2d 807 (La. 1988); Neely v. Hollywood Marine, Inc., 530 So.2d 1116, 1123 (La. 1988). As a significant defense of maritime litigants and essential feature of the maritime law of the United States forum non conveniens preempts conflicting state law. Choo at 316, 319.

ADC anticipates that plaintiff will contend the maritime doctrine of forum non conveniens is strictly procedural and, pursuant to Louisiana Code of Civil Procedure Article 123, not applicable in a Louisiana state court. See Markzannes [sic] v. Bermuda Star Line, Inc., 545 So.2d 537 (La. 1989), U.S. cert. denied _____ U.S. _____, 110 S. Ct. 837 (1990).[2] In Markzannes, a foreign seaman's action, The Louisiana Supreme Court held that Louisiana procedural law governs all actions brought in Louisiana state courts and that Louisiana Code of Civil Procedure Article 123, which permits dismissal on the grounds of

---

[2] In Markozannes the Louisiana Supreme Court reversed the Louisiana Fourth Circuit Court of Appeal which held the maritime doctrine of forum non conveniens must be applied by Louisiana state courts. See the unreported original opinion and opinion on rehearing of the Louisiana Fourth Circuit Court of Appeals attached hereto in globo as Exhibit "B".

forum non conveniens, is inapplicable to actions brought pursuant to the Jones Act or general maritime law. Id.

The Louisiana Supreme Court's decision in Markzannes is clearly erroneous because it disregards the general maritime law and mandate of federal preemption. See generally Choo, 817 F.2d 307. In Choo, the United States Court of Appeals for the Fifth Circuit affirmed a district court's injunction of a state court proceeding, holding that a Texas "open forum" statute is inapplicable in a maritime case. The court reasoned that the Federal Uniformity Doctrine requires state courts to apply the forum non conveniens rule of the general maritime law in any case over which the federal courts would have admiralty jurisdiction. 817 F.2d at 324. In reaching its conclusion, the Fifth Circuit expressly rejected the same "procedural" argument recently adopted by the Louisiana Supreme Court in Markzannes. Id. The United States Supreme Court did not decide the merits of the forum non conveniens argument in Choo but reversed the Fifth Circuit on other grounds. 108 S. Ct. 1684.

This Court should be guided by the federal jurisprudence and not the erroneous reasoning of the Louisiana Supreme Court in Markzannes. Applying the Fifth Circuit's analysis in Choo, Louisiana Code of Civil Procedure Article 123 is inapplicable and preempted by the maritime doctrine of forum non conveniens. Id.

B. UNDER THE GENERAL MARITIME DOCTRINE OF FORUM NON CONVENIENS, THIS CASE SHOULD BE DISMISSED SUBJECT TO THE RIGHT OF THE PLAINTIFF TO PURSUE HIS CLAIM IN PENNSYLVANIA.

Since the doctrine of forum non conveniens must be

applied by state court where appropriately raised as a defense, this Court should examine the factors and rationale behind the doctrine to determine whether its application mandates that this case be conditionally dismissed. In determining whether dismissal of a suit based on forum non conveniens is appropriate, trial courts must balance several private and public factors.[3] Id. The private factors include:

1. Ease of access to proof in the chosen form;

2. Availability of compulsory process for tenants of witnesses;

3. Cost of obtaining willing witnesses;

4. The possibility of view of the premises;

The public factors include:

1. The court's administrative difficulties when litigation is piled up in congested centers instead of being handled at its origin;

2. Imposing jury duty on the people of the community which has no relation to litigation, i.e., no strong local interest in litigation. Id.

Balancing the private and public factors, it is obvious that this case should be conditionally dismissed on forum non

---

[3] Forum non conveniens issues are now decided in maritime cases in the same manner as non-maritime cases, viz. by using the Gilbert analysis. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S. Ct. 652 (1981); In re air Crash Disaster in New Orleans, La., 821 F.2d 1147 (5th Cir. 1987), cert. denied, __ U.S. __, 108 S. Ct. 2819 (1988).

conveniens grounds, subject to the plaintiff's right to recommence the action in a Pennsylvania court. Louisiana has no connection with this litigation. The accident occurred in Pennsylvania near where the vessel would be available for inspection. Virtually all medical witnesses and records are located in Pennsylvania or New York beyond the subpoena power of this Court. All potential fact witnesses were last known to be in the New York area. Obtaining witnesses' testimony for a trial in Louisiana would be very difficult and would depend to a large extent on the always doubtful willingness of witnesses to give their testimony. Moreover, conducting discovery for depositions and/or perpetuating depositions for trial in this forum would be exorbitantly expensive. By comparison, a Pennsylvania forum would be more convenient and less expensive because of the availability and ease of access to the sources of proof and a Pennsylvania court's power to compel the attendance of unwilling witnesses. Accordingly, all private factors strongly favor a Pennsylvania forum.

The public factors clearly weigh in favor of a Pennsylvania forum also. As this Court is well aware, the Civil District Court of Orleans Parish has an enormous case load manifested by this division's congested case and rule dockets and numerous identical trial settings. The difficulties experienced by this Court and its litigants are enormously multiplied when it entertains suits that have no valid relationship to this state or forum, particularly, as in this case, when neither party is a Louisiana resident and the alleged incident giving rise to the claim occurred thousands of miles away. Clearly, the Civil District Court of Orleans Parish should not be the court of first resort for a nonresident plaintiff who was not injured here or hospitalized here and where none of the witnesses or sources of proof are subject to the court's compulsory process. Common sense and justice dictate that this matter should be conditionally dismissed subject to the plaintiff's right to prosecute in a more interested Pennsylvania forum.

As the Supreme Court stated in Gilbert, jury duty should not be imposed on the people of the community which has no relation to the litigation. 330 U.S. at 508. Given Louisiana's obvious lack of interest and connection to this dispute, Louisianians should not be compelled to adjudicate this case.

CONCLUSION

ADC does not have contacts with Louisiana sufficient to make it constitutionally amenable to defend plaintiff's action here. Therefore, ADC's exception of lack of in personam jurisdiction should be maintained and plaintiff's action should be dismissed. Alternatively, plaintiff's case should be conditionally dismissed under forum non conveniens grounds. The controlling public and private factors enunciated in Gilbert and Reyno support its dismissal subject to refiling in a Pennsylvania forum.

Respectfully submitted,

/s/ N. Eleanor Graham
THOMAS J. WAGNER #13143
N. ELEANOR GRAHAM #16946
C & R Building - Suite 250
336 Camp Street
New Orleans, Louisiana 70130-2804
Telephone: (504) 525-2141
and
WAGNER & BAGOT
Attorneys for Defendant,
American Dredging Company

* * *

[Service Instructions Omitted in Printing]

* * *

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 89-25877 DIVISION: "E"

WILLIAM R. MILLER, SR.

VERSUS

AMERICAN DREDGING COMPANY

FILED: _____ _____
DEPUTY CLERK

[EXHIBIT A To Exceptions of Lack of Jurisdiction in Personam and Alternatively, Forum Non Conveniens]

JOHN SPYRIDON MARKZANNES NO. 88-C-2440

VERSUS COURT OF APPEAL

BERMUDA STAR LINE, INC, ET AL FOURTH CIRCUIT
STATE OF LOUISIANA

ON APPLICATION FOR REHEARING

The trial court ruled that since the defendant agreed to accept service of process in Orleans Parish, it was prevented from arguing forum non conveniens. This court reversed the trial court, and remanded the case with the instruction that a forum non conveniens agreement is not waived by waiving jurisdictional arguments. This court on March 20, 1989 ordered the trial court to rule on the merits of the forum non conveniens exception. The plaintiff now seeks a rehearing arguing: 1) This court's

reliance on Exxon Corporation v. Chick Kam Choo, 817 F.2d 305 (Fifth Cir. 1987) was incorrect because that case was overruled and 2) This court misinterpreted C.C.P. 123.

We consider rehearing on this writ under Rule 2-18.7, Uniform rules, Courts of Appeal.

CHICK KAM CHOO

The applicant states Chick Kam Choo, supra, was overruled by the U.S. Supreme Court, __ U.S. __, 108 S.Ct. 1684 (1988). In that opinion the Supreme Court interpreted the Anti-Injunction Act, 28 U.S.C.A. Sec. 2283 and its "relitigation" exception which permits a federal court to issue an injunction "to protect or effectuate its judgments." The U.S. Fifth Circuit in its opinion affirmed a Federal District Court ruling which issued a broad injunction, prohibiting litigation in Texas state court. The plaintiff had originally filed suit in federal court asserting

This is the course respondents must follow with respect to the Singapore law claim. It may be that respondents' reading of the pre-emptive force of federal maritime forum non conveniens determinations is correct. This is a question we need not reach and on which we express no opinion. We simply hold that respondents must present their pre-emption argument to the Texas state courts, which are presumed competent to resolve federal issues. Cf. Pennzoil Co. v. Texaco, Inc., 481 U.S., at ____; Clothing Workers, supra, at 518, 75 S.Ct. at 456-57. Accordingly, insofar as the District Court enjoined the state courts from considering petitioner's Singapore law claim, the injunction

exceeded the restrictions of the Anti-Injunction Act.

Id. at 1691

By so ruling, it appears that the Supreme Court remanded the case to federal District Court for a determination of whether a more narrowly drafted injunction was proper, keeping in mind that the Texas state courts must rule on the forum non conveniens issue. The holding does not reverse the rule of law cited by the Fifth Circuit and relied on by this court, that is, the forum non conveniens rule of the general maritime law controls; inconsistent state law cannot be applied. (overruling Kassapas argued by the plaintiff but declared "wrong" by the Fifth Circuit, 817 F.2d at 324). On the contrary, the opinion supports this court's ruling: the Louisiana district court should make a forum non conveniens determination based on federal maritime law, which determination the state court is presumed competent to resolve.

INTERPRETATION OF C.C.P. ARTICLE 123

The applicant attacks this court's statement that "[A]rt. 123 by its own terms is inapplicable to claims brought pursuant to the Jones Act and federal maritime law." C.C.P.art.123(C). C.C.P.art.123 (C) provides: "The provisions of Paragraph (B) shall not apply to claims brought pursuant to 46 USC Sec. 688 or federal maritime law." Paragraph (B) provides that a suit against a non-resident plaintiff based solely on a federal statute and based on acts or omission occurring outside of Louisiana may be dismissed without prejudice if the forum is shown to be inconvenient. Such a case brought by a resident plaintiff may not be dismissed. As such, paragraph (B) provides state substantive law to be applied in cases asserting federal causes of action. Paragraph (C) "by its own terms" renders that provision inapplicable to cases brought pursuant to the Jones Act and federal maritime

law. The legislature has not "prohibited the application of forum non conveniens in state court" as argued by the defense. It has rendered state forum non conveniens doctrine inapplicable. Federal forum non conveniens doctrine, as noted by the U.S. Fifth Circuit in Chick Kam Choo and this court on the first hearing on this writ application, is applicable.

The plaintiff refers to a recommendation of the Louisiana Civil Law Committee to repeal section (C). Recommendations of that committee do not change articles promulgated by the legislature, which articles this court is bound to follow.

Accordingly our original order of March 20, 1989 remains unchanged.

New Orleans, Louisiana, this 19th day of April, 1989.

/s/ RJK
JUDGE ROBERT J. KLEES

/s/ JG
JUDGE JIM GARRISON

/s/ WHB
JUDGE WILLIAM H. BYRNES, III

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 89-25877 DIVISION: "E"

WILLIAM R. MILLER, SR.

VERSUS

AMERICAN DREDGING COMPANY

FILED:_____ _____
DEPUTY CLERK

[EXHIBIT B To Exceptions of Lack of Jurisdiction in Personam and Alternatively, Forum Non Conveniens]

JOHN SPYRIDON MARKZANNES NO. 88-C-2440

VERSUS COURT OF APPEAL

BERMUDA STAR LINE, INC. ET AL FOURTH CIRCUIT
STATE OF LOUISIANA

IN RE: BERMUDA STAR LINE, INC., ET AL
APPLYING FOR: SUPERVISORY WRITS
DIRECTED TO: HONORABLE REVIUS O. ORTIQUE, JR., JUDGE, CIVIL DISTRICT COURT, PARISH OF ORLEANS, DIVISION "H", NO. 88-8624

WRIT GRANTED

Plaintiff, a citizen and resident of Greece, filed suit in Civil District Court against his employer, a Cayman Islands

Corporation, with its base of operations in New Jersey and no office or agent for service of process in Louisiana, and its insurer. The plaintiff sought maintenance and cure and damages for an illness or injury he sustained aboard the S.S. Bermuda Star, a Panamanian vessel, bareboat chartered to and operated by the defendant. The injury occurred while the vessel was on the high seas between Boston and Bermuda. The plaintiff was hospitalized and treated in New York before being repatriated to Greece.

Before filing suit, the plaintiff's counsel announced he intended to have the Bermuda Star seized when it docked in New Orleans to secure jurisdiction here. In response, the defense agreed to accept service here and not to contest personal jurisdiction. The defense then filed an exception of improper venue and a motion to dismiss based on forum non conveniens which were denied. The defendant filed this writ seeking this court's supervisory jurisdiction to review those rulings December 8, 1988. The relator announced at that time it wanted to supplement the record with the transcript of the hearing on the motions. That transcript has not yet been received by this court. However, it appears that the issues can be addressed without the transcript.

STATE LAW OR FEDERAL LAW?

In Exxon Corp v. Chick Kam Choo, 817 F.2d 305, 324 (5th Cir. 1987) the U.S. Fifth Circuit held:

> Under the federal uniformity doctrine state courts must apply the forum non conveniens rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction. State law inconsistent with that doctrine cannot be applied in a maritime case. Accord Couch V.

Chevron International Oil Co., 672 S.W.2d 16 (Tex.App.-Houston [14th Dist.] 1984 writ ref'd, n.r.e.); but cf. Couch v. Chevron International Co., 682 S.W.2d 534 (Texas. 1984); contra Kassapas, 485 So.2d 567.

See also In Re Air Crash Disaster Near New Orleans, La, 821 F.2d 1145 (5th Cir. 1987). The respondent argues the applicability of C.C.P. art. 123, citing Kassapas v. Arkon Shipping Agency, Inc., 485 So. 2d 656 (La. App. 5th Cir. 1986) writ. den. 488 So. 2d 203 U.S. cert. den. 107 S.Ct. 422 (1986) for the proposition that forum non conveniens is a procedural, rather than a substantive, law and that state court must follow its own procedural law. The Kassapas opinion was declared unequivocally "wrong" in Choo. Moreover, C.C.P. art. 123 by its own terms is inapplicable to claims brought pursuant to the Jones Act and federal maritime law. C.C.P. art. 123(c). Thus, since this is a case brought before state court by a foreign citizen over which federal courts have admiralty jurisdiction, the trial court must apply the forum non conveniens rule of general maritime law. Choo.

DOES WAIVER OF LACK OF PERSONAL JURISDICTION EXCEPTION RENDER INAPPLICABLE FORUM NON CONVENIENS DOCTRINE?

The relator states that the trial court found that the relator could not argue forum non conveniens after agreeing not to contest jurisdiction.

The doctrine of forum non conveniens presupposes that jurisdiction and venue are correct in the suit. Indeed, the doctrine can "never apply if there is absence of jurisdiction or mistake of venue". Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 503, 67 S.Ct. 839, 841 (1947).

As such, consenting to jurisdiction does not prevent a litigant from arguing forum non conveniens. Indeed, the litigant could not argue the doctrine if jurisdiction did not exist.

Accordingly, the judgement of the trial court dated October 24, 1988 dismissing relator's exceptions is hereby reversed. This matter is remanded to the trial court with the directive that a forum non conveniens argument is not waived by waiving jurisdictional arguments. Thus the trial court should bear argument on this issue and rule on the merits of the forum non conveniens exception.

New Orleans, Louisiana, this 20th day of March, 1989.

/s/ RJK
JUDGE ROBERT J. KLEES

/s/ JG
JUDGE JIM GARRISON

/s/ William H. Byrnes, III
JUDGE WILLIAM H. BYRNES, III

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E" DOCKET NO.

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED:_____ _____
DEPUTY CLERK

MEMORANDUM IN OPPOSITION TO DEFENDANT'S EXCEPTIONS OF LACK OF JURISDICTION IN PERSONAM AND, ALTERNATIVELY, FORUM NON CONVENIENS

MAY IT PLEASE THE COURT:

The defendant, American Dredging Company, (hereinafter ADC) has filed Exceptions of Lack of Jurisdiction in Personam and Alternatively, Forum Non Conveniens in this matter. The basis of the exception to jurisdiction is that although ADC has contacts with Louisiana, ADC argues that these contacts are not sufficient under the constitutional standards. As to the forum non conveniens argument the defendant clearly points out that Louisiana Law, as well as the Louisiana Supreme Court have ruled that the maritime doctrine of forum non conveniens is not applicable to proceedings in a Louisiana State Court. However, ADC is asking this court to dismiss this action based on a doctrine that is clearly not applicable in this State.

FACTS

William R. Miller, hereinafter (Miller), was employed by ADC in the capacity of a seaman and member of the crew of the M/V JOHN R, a vessel owned by ADC. On or about December 12, 1987, Miller was working in the course and scope of his employ for ADC on the Delaware River, when he was injured aboard their vessel. After being injured, Miller received initial treatment at the Sacred Heart Medical Center in Chester, Pennsylvania. Mr. Miller was admitted on December 13, 1987 and remained in that medical facility until December 23, 1987. The only other extensive treatment rendered in that area was at the Hospital for Joint Diseases Orthopedic Institute, which is located in New York, New York. This involved two or three examinations. The treatment lasted until sometime in February of 1988.

Shortly, after this Miller returned to Biloxi, Mississippi where he remains as a resident. For about seven years during the late 1970's and early 1980's, Miller resided in the State of Louisiana and worked for various boat companies. Prior to leaving to work for ADC, Miller was a resident of the State of Mississippi. This was until August of 1987, when Mr. Miller went to Pennsylvania seeking work through the Union of Operating Engineers, Local 25, whose office is in Philadelphia, Pennsylvania. Miller lived in that area only while he was working as a captain for ADC. Miller is currently a resident of the State of Mississippi.

Since returning in February of 1988, Miller has been primarily treated by Dr. Chris Wiggins, whose office is located in Pascagoula, Mississippi. In addition to Dr. Wiggins, there have been several other consulting physicians in the Mississippi Gulf Coast area who have rendered treatment to Mr. Miller.

ADC, which is a Pennsylvania corporation, with its principal place of business in Camden, New Jersey. Therefore, ADC is a foreign corporation but has a current license to do business in Louisiana. ADC has maintained this license with the Louisiana Secretary of State since 1959. Today, ADC is still a corporation in good standing with the Louisiana Secretary of State's office. (See attached Exhibit 1). In addition, as admitted by the defendant's in their memorandum in support of their exceptions, ADC currently maintains an agent for service of process in New Orleans. This agent is CT Corporations, the agent which was served with Miller's lawsuit on December 19, 1989.

ADC has had and is continuously looking for more substantial contacts with the State of Louisiana. The dredging work referred to by the defendants in their memorandum which was completed in 1983, was a job done through the U.S. Army Corps of Engineers in Lake Pontchartrain. The total amount of money that was paid to ADC for this dredging work was around $4,900,000.00. Since that time, ADC has continuously purchased bids specifications and plan proposals from the U.S. Army Corps of Engineers in anticipation of getting further work in the State of Louisiana.

In addition to performing substantial work and deriving substantial revenue from work performed in the State of Louisiana and Orleans Parish, ADC has continuously been involved in different litigation in the United District Court for the Eastern District of Louisiana. The latest such action was a proceeding entitled American Dredging Company v. Pan Ocean Marine, et al. (See attached docket sheet from U.S.D.C. for the E.D.La., Exhibit 2). It should be noted that ADC was the plaintiff in this action and therefore purposely entered the jurisdiction of the State of Louisiana for their own benefit. This action by ADC was commenced after Miller's accident which occurred in December

of 1987. The Eastern District petition was filed on December 6, 1988. As can be noted from Exhibit 2, this was not the first time that ADC was involved in litigation in a Louisiana forum. ADC has been involved in numerous proceedings in the Eastern District of Louisiana as both a party defendant and party plaintiff.

EXCEPTION OF LACK OF JURISDICTION AND PERSONAM

The Louisiana Supreme Court in Superior Supply Company v. Associated Pipe and Supply Company, 515 So.2d 790 (La. 1987), discusses the Louisiana "Long Arm Statute", L.S.A.-R.S. 13:1301. This case specifically addresses the 1987 amendment to this statute which added Subsection B, which provides:

In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.

The court explains that the only inquiry now necessary in order to determine if a Louisiana forum's exercise of jurisdiction over a nonresident is constitutional is whether or not constitutional requirements of due process have been met. Superior Supply, supra at p. 792. Accordingly, the Louisiana Supreme Court reviewed forty years of United States Supreme Court's jurisprudence, starting with International Shoes Co. vs. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Concerning this forty years of jurisprudence, the court states the following:

> The theme that emerges from this series of decisions, rendered over a period of more than forty years and authored by a number of different justices, is that when a nonresident who has purpose-

fully established contacts and relationships with the forum state contests the assertion of personal jurisdiction, the court must analyze the quality and nature of the contacts, the relationship among the defendant, the forum and the litigation, and the evidence presented by the nonresident of facts militating against the exercise of jurisdiction, and must then determine whether the exercise of jurisdiction is reasonable.

In footnote 14 following this sentence, the court states:

> The obvious threshold question is whether any contacts or relationships exist which were the foreseeable result of the nonresident's purposeful conduct. After determining the existence of contacts, the court examines the quality and nature of the contacts and determines whether it is reasonable, in the light of all relative factors, to require the nonresident to defend himself in the forum state.

Using this analysis, it is clear that ADC has purposely established contacts and relationships with the State of Louisiana. The analysis then goes to the following:

1. The quality and nature of the contacts;
2. The relationship among the defendant, the forum and the litigation;
3. The evidence presented by the nonresident of facts militating against the exercise of jurisdiction; and
4. Whether the exercise of jurisdiction is reasonable.

The facts as stated above and which will be introduced at the trial of the exception, will show that by bidding on and being awarded and then performing the dredging contract in Lake Pontchartrain for the United States Army Corps of Engineers, as well as being involved in numerous lawsuits in the United States District Court for the Eastern District of Louisiana, both as plaintiff and defendant; ADC has purposely established contacts and relationships with the State of Louisiana.

The first step of the analysis goes to the quality and nature of those contacts. Obviously, a contract which generates revenues of $4,900,000.00 is one of a very serious nature and high quality. It is anticipated that a representative of the United States Army Corps of Engineers will testify as to how extensive the actual work performed in Lake Pontchartrain was under this contract.

Concerning the established contacts and relationships dealing with the United States District Court forum in Eastern District of Louisiana, it is clear that ADC is very willing to come in and use a Louisiana forum when it is to their benefit. Also, as that Court's docket reflects, ADC has had enough purposeful contacts and relationships with the State of Louisiana to be involved in litigation on over sixteen (16) occasions. These actions were filed between 1976 and 1988, which includes the time when Miller was injured.

The next inquiry goes to the relationship among the defendant, the forum and the litigation. It is agreed that William Miller's cause of action did not arise directly from the defendant's contacts and relationships with this forum. However, Miller, a former resident of the State of Louisiana and a current resident of the State of Mississippi has chosen the Louisiana forum to sue ADC and has effected service of process on ADC's agent, which

is located in Orleans Parish, State of Louisiana. In light of the defendant's willingness to use a Louisiana forum to resolve its disputes whenever it sees fit, why should ADC now protest this Court exercising jurisdiction over this particular proceeding?

The third inquiry goes into the evidence presented by the nonresident of facts militating against the exercise of jurisdiction. ADC in its memorandum in support of its exception has cited the following reasons which they claim will militate against this court exercising jurisdiction:

1. ADC is a Pennsylvania corporation;
2. ADC has no office or corporate representative in Louisiana;
3. ADC has no property or bank accounts in Louisiana;
4. ADC has not done any dredging business in Louisiana since 1983;
5. ADC has a registered agent for service of process in New Orleans only to meet Army Corps of Engineers requirements should ADC ever submit a bid on dredging projects in Louisiana;
6. Plaintiff's action neither arises out of nor relates to ADC's limited contacts with Louisiana;
7. All potential fact witnesses to the alleged accident were last known to be residing in the New York area;
8. The majority of plaintiff's medical treatment resulting from the alleged accident occurred near Philadelphia, Pennsylvania and in New York;
9. The tug JOHN R will be available for inspection in Camden, New Jersey and has never navigated in Louisiana.

The first fact is that ADC is a Pennsylvania corporation.

However, ADC has also been licensed as a corporation in Louisiana since 1959 and is currently a corporation in good standing with the Louisiana Secretary of State. The next two facts cited by the defendant is that ADC has no office or corporate representative in Louisiana and that ADC has no property or bank accounts in Louisiana. In light of the extensive contacts and the substantial revenue derived by ADC's relationships with the State of Louisiana, these two factors seem inconsequential.

The next factor that ADC has cited is that ADC has not done any dredging business in Louisiana since 1983. However, the work that was performed generated $4,900,000.00 worth of work and involved quite an extensive amount of dredging in Lake Pontchartrain. In addition, ADC has purchased bids specifications and plan proposals for additional work to be let out for bid by the U.S. Army Corps of Engineers in the State of Louisiana. In fact, ADC has purchased over twenty-four such bids specifications or plan proposals within the last year. Therefore, ADC is ready and willing, and in fact is just waiting for the right opportunity, to come back to the State of Louisiana and generate additional, substantial revenue.

ADC admittedly has a registered agent for service of process in New Orleans, although they state that this is only to comply with the Army Corps of Engineers requirements, should ADC ever submit a bid on dredging projects in Louisiana. This factor does not militate against, but in fact supports this Court's finding that there is jurisdiction over this corporate defendant. Under the substantial justice and fair play notions of the United States Supreme Court due process standards, one of their requirements is that the nonresident defendant be given proper notice of the proceedings against it. This was discussed in Perkins v. Benquet Mining Co. 342 U.S. 437, 72 S.Ct. 413 (1952). The court stated that because actual notice of the

proceeding was given to the corporation through regular service of summons upon its president while he was in Ohio acting in that capacity, that there was no jurisdictional objection based upon a lack of notice to a responsible representative of the corporation. Perkins, supra at pp. 439, 440. Further at page 445, the court states:

> The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of state are to be determined in each case. The corporate activities of a foreign corporation which, under state statute, make it necessary to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not conclusive test.

Obviously, ADC's relationship with the State of Louisiana is important enough in their mind to have maintained a license to do business in the State of Louisiana since 1959 and to continuously maintain an agent for service of process in the Parish of Orleans.

The next factor cited by ADC to militate against the exercise of jurisdiction is that the plaintiff's action neither arises out of nor relates to ADC's limited contacts with Louisiana. Perkins v. Benquet Mining Co., supra, clearly shows that this factor is not controlling. The Court states:

> This conforms to the realistic reasoning in International Shoe Co. v. Washington, supra at p. 318-319; '...there have been instances in which the continuous corporate operations within a state

were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. (See Missouri K. & T. R. Co. v. Reynolds, 255 U.S. 565; Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915; cf. St. Louis S.W.R. Co. v. Alexander, supra [227 U.S. 218].

'...some of the decisions holding the corporation amenable to suits have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. Lafayette Insurance Co. v. French, 18 How. 404, 407; St. Clair v. Cox, supra [106 U.S. 350], 356; Commercial Mutual Co. v. Davis, supra [213 U.S. 245] 254; Washington Court v. Superior Court., 289 U.S. 361, 364-365. But more realistically it may be said that those authorized acts were in such a nature as to justify the fiction. Smolik v. Philadelphia & Readings Co., 222 F. 148, 151. Henderson, The Position of Foreign Corporations in America Constitutional Law, 94-95.

'...whether due process is satisfied must depend rather upon the quality and nature of the activities in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations. C F. Pennoyer v. Neff,

supra [95 U.S. 714]; Minnessota Commercial Assn. v. Benn, 261 U.S. 140; Perkins, supra at pp. 446, 447.

Clearly, Miller's entire claim that this Court should exercise jurisdiction over this corporate defendant is that due process is satisfied because of the quality and nature of ADC's activities in the State of Louisiana. These activities have been quite extensive and have been continuous and systematic. Their system is to review all contracts let out by the Army Corps of Engineers for dredging work in the State of Louisiana and then to systematically choose the one from which they feel they can make substantial revenue.

The next two factors deal with the location of the fact and medical witnesses. These factors may be considered under the forum non conveniens argument which will be discussed below, however, this has no application and is not argued as a militating factor against the exercise of jurisdiction by the defendants. The only other fact listed by the defendants is that the tug JOHN R will be available for inspection in Camden, New Jersey and that the tug does not and has never navigated in Louisiana. This only creates a burden for the plaintiff, not the defendants. A burden which the plaintiff obviously must have considered prior to filing the lawsuit in Orleans Parish. Therefore this fact does not militate against this Court exercising jurisdiction.

The defendants argued in their brief that the due process clause mandates that the plaintiff's action be dismissed. Based on the above and foregoing discussion, especially in light of the substantial contacts that ADC has purposely had with the State of Louisiana, it is clear that the notions of justice and fair play would not be offended by this Court exercising jurisdiction over ADC.

EXCEPTION OF FORUM NON CONVENIENS

Although ADC feels that the Louisiana Supreme Court's decision in Markzannes v. Bermuda Starline, Inc., 545 So.2d 537 (La. 1989), cert. denied, _____U.S. _____ 110 S.Ct. 837 (1990)is "clearly erroneous", this is clearly the law for the State of Louisiana. This issue was also decided by the Louisiana 5th Circuit Court of Appeals in Kassapas v. Arkon Shipping Agency, Inc., 485 So.2d 565 (La. App. 5th Cir. 1986). writ. denied. 488 So.2d 203, cert. denied 107 S.Ct. 422, 92 L.Ed. 2d 372. As the 5th Circuit Court of Appeals noted in Kassapas:

> We therefore hold that the trial court erred in conditionally dismissing the case on the ground of forum non conveniens to hold otherwise would, as noted in Trahan v. Phoenix Ins. Co, supra, "constitute judicial legislation of the rankest sort"(at 122). Kassapas, supra at p. 567.

Therefore, again, it is clearly the law in the State of Louisiana that the doctrine of forum non conveniens is inapplicable in a State Court proceeding. As pointed out in Kassapas, this will be the law until the Louisiana legislature decides to change it. Therefore, ADC's exception based on forum non conveniens should be denied.

Respectfully submitted,

/s/ Timothy J. Falcon
TIMOTHY J. FALCON
Bar Roll No. 16909
500 Verret Street
New Orleans, Louisiana 70114
(504) 366-6642

* * *

[Service Instructions & Exhibits Omitted in Printing]

* * *

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E"

WILLIAM R. MILLER, SR.
Versus
AMERICAN DREDGING COMPANY

FILED: _____ _____
DEPUTY CLERK

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF EXCEPTIONS OF LACK OF JURISDICTION IN PERSONAM AND FORUM NON CONVENIENS

MAY IT PLEASE THE COURT:

Defendant, American Dredging Company ("ADC"), submits this supplemental memorandum in response to plaintiff's allegations.

EXCEPTION OF LACK OF JURISDICTION IN PERSONAM

Plaintiff has overstated defendant's contact with the forum state. First, plaintiff claims that defendant uses "a Louisiana forum to resolve its disputes whenever it sees fit" (p.5). Of the sixteen suits referred to by plaintiff, ADC was a defendant in twelve.[4] Clearly, a defendant does not choose the forum or use the forum state. ADC was the plaintiff in only four instances,

[4] After looking into the records of the sixteen aforementioned suits, a common thread among them is apparent. Most were either dismissed in favor of ADC or settled prior to trial.

three of which occurred more than ten years ago, once in 1976, once in 1977 and once in 1979. The most recent case referred to was a Rule 23 interpleader action in which ADC merely requested that the court distribute funds to third parties.

The full facts of this case must be interpreted according to existing law. As cited by the plaintiff on Page 6 of his opposition memorandum, "the obvious threshold question is whether any contacts or relationships exist which were the foreseeable result of the non-resident's purposeful conduct." The first and critical question is the foreseeability of the litigation based on the non-resident's purposeful conduct. ADC's "purposeful" conduct was litigation in which it was primarily named as a defendant. Its only recent "use" of the forum state was to pay money in an interpleader action so that the actual Louisiana litigants could use the Louisiana forum. This dated and sporadic use of the court system in the forum state hardly makes it foreseeable that the present litigation would occur, especially since this suit is based on an accident which occurred on the Delaware River, on a vessel which has never navigated in the forum state, with a plaintiff who is a resident of Mississippi.

The threshold requirement of foreseeability of the litigation is clearly not met. The analysis then turns to the reasonableness of requiring a non-resident to defend in the forum state. The court's inquiry into the reasonableness of the suit is based upon the quality and nature of the conduct. Although, as plaintiff stated, ADC may be ready and willing to do business in the State of Louisiana, the fact is that ADC is not currently doing business in Louisiana. The last work performed by ADC in Louisiana occurred in 1983. This singular event cannot be considered sufficient to meet the standard of "continuous and systematic contacts" as set forth by the Supreme Court in Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 415, 104

S. Ct. 1868, 1872, 80 L. Ed. 2d 404 (1984).

Plaintiff then points to ADC's registration with the Louisiana Secretary of State as a meaningful contact. This registration alone is not evidence of ongoing activity in Louisiana. It only signifies that ADC is open to the possibility of working with the Corps of Engineers in the future. Again, expressing a desire to do business in Louisiana is not the same thing as doing business. Therefore, plaintiff's suggestion that because ADC would consider future business contacts with the forum state warrants this court's exercise of personal jurisdiction, is incorrect.

As plaintiff cites in Perkins v. Benquet Mining Co., 342 U.S. 437, 72 S. Ct. 413 (1952):

> [T]here have been instances in which the continuous corporate operations within the state were so substantial and of such a nature as to justify suit against it and causes of action arising from dealings entirely distinct from those activities. See Missouri K. Nt. R. Company v. Reynolds, 255 U.S. 565; Tauzea v. Susquehanna Coal Company, 220 N.Y. 259, 115 N.E. 915; cf. St. Louis SWR Company v. Alexander, supra [227 U.S. 218].

Clearly, this quote relied on by plaintiff strengthens defendant's case for lack of personal jurisdiction by the forum state. The court in Perkins explains that if the cause of action and the defendant's contacts with the forum state are unrelated, the contacts must be continuous and substantial. In our case, the cause of action arises from dealings entirely distinct from the defendant's past sporadic activities, and defendant's past contacts with the forum state can in no way be described as continuous or substantial. Therefore, the absence of contacts by ADC mandates, based on the due process clause, that plaintiff's action be dismissed. ADC has not had purposeful contact with the State of Louisiana, therefore, it is clear that the notions of justice and fair play would be offended by this court exercising jurisdiction over ADC.

EXCEPTION OF FORUM NON CONVENIENS

Forum non conveniens is a jurisprudentially created doctrine which has long been an integral part of the general maritime law. Exxon Corporation v. Chick Kam Choo, 817 F.2d 307, 322 (5th Cir. 1987), rev'd on other grounds, _____ U.S. _____, 108 S. Ct. 1684 (1988). As mentioned by the plaintiff, the defendant still contends that this court should reject the opinion of the Kassapas court. The absence of the state procedural rule regarding dismissal on forum non conveniens grounds should not preclude the application of the doctrine under general maritime law. As the Louisiana Supreme Court stated in Lavergne v. Western Co. of N. Amer., Inc., 371 So. 2d 807, 810 (La. 1979);

> It has long been established that a state court, having concurrent jurisdiction with the federal courts as to in personam admiralty claims, is free to adopt such remedies and attach to them such incidents as it sees fit so long as it does not attempt to modify or displace essential features of a substantive maritime law. (Emphasis added.)

To disregard forum non conveniens because of the silence of Louisiana legislature would effectively displace a substantive doctrine of maritime law. See also Symeonides v. Cosmar, 433 So. 2d 281 (La. App. 1st Cir. 1983) (application of forum non

conveniens in state maritime cases recognized). Alleviating forum shopping was a principal reason admiralty courts fashioned the doctrine of forum non conveniens. It represents a traditional response to possible misuse by plaintiffs in selecting their forums. Hence, this court should apply the doctrine of forum non conveniens in accordance with the federal uniformity doctrine and close the open-door policy fostered by Kassapas.

Defendant acknowledges the ruling of the Louisiana Supreme Court in Markozannes which would appear to disallow admiralty doctrines in Jones Act cases heard in state court. We respectfully submit to you now that this court is bound by admiralty principles of forum non conveniens even when in conflict with ruling of the Louisiana state court. See Choo, supra.

CONCLUSION

ADC does not have contacts with Louisiana sufficient to make it constitutionally amenable to defend plaintiff's action here. Therefore, ADC's exception of lack of in personam jurisdiction should be maintained and plaintiff's action should be dismissed. Alternatively, plaintiff's case should be conditionally dismissed under forum non conveniens grounds. This court is bound by the federal jurisprudence even in face of contrary ruling by superior courts of Louisiana. Applying the Fifth Circuit's analysis in Choo, La. Code Civ. P. art. 123 is applicable and preempted by the longstanding maritime doctrine of forum non conveniens.

Respectfully submitted,

/s/ Thomas J. Wagner
Thomas J. Wagner (13143)
336 Camp Street
Suite 250, C & R Building
New Orleans, Louisiana 70130-2804
Telephone: (504) 525-2141

and

WAGNER & BAGOT
Attorneys for Defendant,
American Dredging Company

* * *

[Service Instructions Omitted in Printing]

* * *

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E"

* * * * * * * * * * *

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED:_____ DY. CLERK:_____

* *

JUDGMENT

This matter came on for hearing on September 21, 1990, on the exceptions of American Dredging Company for lack of jurisdiction *in personam* and, alternatively, for dismissal by reason of *forum non conveniens*. The court has considered the briefs and memoranda of counsel, reviewed the authorities cited therein; and after weighing the arguments of counsel, the court entered its Reasons for Judgment on September 25, 1990.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the exception of defendant, American Dredging Company, for lack of jurisdiction *in personam* is denied but that the exception under the doctrine of *forum non conveniens*, is granted, and this matter is dismissed subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania.

New Orleans, Louisiana, this 28th day of September, 1990.

/s/ Gerald P. Fedoroff
JUDGE, CIVIL DISTRICT COURT

Respectfully submitted,

Thomas J. Wagner, T.A. (13143)
Michael H. Bagot, Jr. (2665)
336 Camp Street
C & R Building, Suite 250
New Orleans, Louisiana 70130-2804
Telephone: (504) 525-2141
and
WAGNER & BAGOT
Attorneys for American Dredging Company

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E"

* * * * * * * * * * *

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED:_____ DY. CLERK:_____

* *

REASONS FOR JUDGMENT

I am convinced that the appointment of an agent for service of process forecloses any due process argument American Dredging may have had. The question remains whether Louisiana has sought to exercise jurisdiction in cases such as this. Due process does not require it to do so. *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952). Under the laws pertaining to foreign corporations before the 1968 amendments, it was clear that appointment of an agent did not constitute consent to be sued on causes of action arising outside Louisiana. *Staley-Wynne Oil Corp. v. Loring Oil Co.*, 162 So. 756 (La. 1935). This limitation was probably eliminated in the 1968 amendments. *Smith v. Globe Indemnity Co.*, 243 So. 2d 882 (1st Cir. 1971). It certainly was eliminated by the addition of Paragraph B to R.S. 13:3201. The exception to personal jurisdiction will be overruled.

It is patent that the Civil District Court is not a convenient forum. Selection of this Court, having absolutely no connection with the case, is forum shopping of the worse sort. C.C.P. Art. 124 (C) would if valid prevent transfer of this maritime claim out of state.

In *Markzannis v. Bermuda Starline*, 545 So. 2d 537 (La. 1989) in a per curiam opinion granting a peremptory writ, the Supreme Court held that the limitation of C.C. Art. 123 (C) prevails over a contrary federal rule. In *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), the Federal Fifth Circuit Court wrote (at p. 324):

> Under the federal uniformity doctrine state courts must apply the forum non conveniens rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction.

I do not feel bound by a per curiam opinion granting a peremptory writ in the face of a clearly contrary and authoritative pronouncement by a Federal Court of Appeal on an issue of federal law.

Counsel for defendant has been asked to prepare an appropriate order.

NEW ORLEANS, LOUISIANA this 25th day of September, 1990.

/s/ Gerald P. Fedoroff
JUDGE

WILLIAM R. MILLER, SR.	*	NO. 90-C-2175
VERSUS	*	COURT OF APPEAL
AMERICAN DREDGING COMPANY	*	FOURTH CIRCUIT STATE OF LOUISIANA

****

ON APPEAL FROM CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
NO. 89-25877, DIVISION "E"
HONORABLE GERALD P. FEDOROFF, JUDGE

****

The issue in this litigation is whether the federal maritime defense of "forum non conveniens" is applicable to this Jones Act claim filed in the state court.

William R. Miller, plaintiff, is a resident of Mississippi. In August of 1987 he travelled to Pennsylvania seeking employment. He joined the Union of Operating Engineers, Local 25 in Philadelphia. He was hired by American Dredging Company (ADC), a Pennsylvania Corporation to work on the tug "John R". On or about December 12, 1987, while aboard that vessel navigating the Delaware River, Miller was injured. Initially he was treated at the Sacred Heart Medical Center in Chester, Pennsylvania. He received additional treatment at the Hospital for Joint Diseases Orthopedic Institute located in New York. In February, 1988 Miller return to Mississippi where he has been treated by various doctors along the Mississippi Gulf Coast.

ADC's principal office is in Camden, New Jersey. Although ADC is licensed to do business in Louisiana, the tug "John R" has never navigated Louisiana waters.

Miller filed the instant Jones Act and General Maritime Claim in the Civil District Court for the Parish of Orleans. Service was perfected on ADC's registered agent. In response ADC filed exceptions of lack of *in personam* jurisdiction and *forum non conveniens*.

The trial court denied ADC's exception to the jurisdiction but granted the *forum non conveniens* exception. The court dismissed Miller's suit "subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania." The trial court reasoned that state courts must apply the forum non conveniens rule of the general maritime law in this maritime proceeding instituted in state court. Miller perfects this appeal.

The *forum non conveniens* defense is a characteristic feature of the general maritime law. *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990). In *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 305 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S.Ct. 1684 (1988), the U.S. Fifth Circuit stated:

> Under the federal uniformity doctrine state courts must apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction. State law inconsistent with that doctrine cannot be applied in a maritime defense. *Id.* at 324.

Despite this clear federal jurisprudence, Miller argues that the trial court erred. In support, he cites Code of Civil Procedure Article 123, and our Supreme Court's "per curiam" opinion in *Markzannes v. The Bermuda Star Line*, 545 So. 2d 537 (La. 1989).

In *Markzannes*, this Court, in an unpublished opinion, held that the state district court must apply the *forum non conveniens* rule of general maritime law where a foreign citizen brought an admiralty suit in state court. In a per curiam opinion, our Supreme Court, citing La. C.C. Pro. Art. 123(c), held that "Louisiana courts may apply Louisiana procedural law in causes of action brought in Louisiana courts."

Code of Civil Procedure Article 123, sections B and C provide as follows:

> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 USC Sec. 688 or federal maritime law.

Miller argues that, despite the federal pronouncements to the contrary, we are bound by the *Markzannes* holding and the provisions of Article 123(C).

The Federal Fifth Circuit, in *Ikospentakis, supra*, noted that "a federal maritime defense of *forum non conveniens* is constitutionally supreme in a maritime or Jones Act case over state laws that do not recognize this doctrine." *Id.* at 180, citing *Exxon Corp. v. Chick Kam Choo, supra.* The Court went on to recognize Louisiana's failure to abide by this doctrine and stated that "[a]t some point, Louisiana must bend to the federal courts' construction of federal law." *Id.*

In the instant case, the trial court reasoned that the Supreme Court's per curiam holding in *Markzannes* was not binding, and maintained ADC's exception based on an application of federal law. We agree with this reasoning.

In the face of clear pronouncements by the Federal judiciary that maritime cases filed in state court must be governed by the federal doctrine of *forum non conveniens*, we are compelled to apply that defense in the instant case. We agree

with the trial court's factual conclusion that Louisiana has absolutely no connection with this case. Neither party is a Louisiana resident; the accident occurred on the Delaware river; plaintiff was treated in Pennsylvania, New York and Mississippi; the vessel on which he was injured has never navigated Louisiana's waters. The only semblance of connexity with Louisiana is the fact that ADC has a registered agent here. That alone is not enough.

Accordingly, we affirm the trial court's judgment.

AFFIRMED.

WILLIAM ROBERT MILLER, SR.

v.

AMERICAN DREDGING COMPANY

NO. 91-C-1524

SUPREME COURT OF LOUISIANA.

On Writ of Certiorari to the Court of Appeal, Fourth Circuit, Parish of Orleans, State of Louisiana.

MARCUS, Justice

In August 1987, William R. Miller, a Mississippi resident, moved to Pennsylvania and was employed as a seaman by the American Dredging Co. (ADC), a Pennsylvania corporation with its principal place of business in Camden, New Jersey, and with a registered agent for service of process in New Orleans, Louisiana.[1] Miller was injured on the Delaware River while in the course and scope of his employment on the M/V JOHN R., a vessel owned by ADC. He received medical treatment in Pennsylvania and New York, and in February, 1988, returned to Mississippi, where he received additional treatment from physicians in the Mississippi Gulf Coast area. On December 1, 1989, Miller filed a Jones Act (46 U.S.C. § 688) and general maritime claim pursuant to the "saving to suitors" provision in 28 U.S.C.

---

[1] ADC had not done any dredging business in Louisiana since 1983; however, it maintains an agent for service of process in New Orleans in order to preserve its right to bid on Army Corps of Engineers projects.

§ 1333[2] against ADC in the Civil District Court for the Parish of Orleans. ADC filed exceptions of lack of jurisdiction in personam and, alternatively, forum non conveniens. The trial court denied the exception of lack of jurisdiction in personam, but granted the exception of forum non conveniens and ordered the matter dismissed "subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania." Miller appealed. The court of appeal affirmed.[3] Upon Miller's application, we granted certiorari to consider the correctness of that decision.[4]

---

[2] 28 U.S.C. § 1333 provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. [emphasis added]

[3] 580 So. 2d 1091 (La. App. 4th Cir. 1991).

[4] 587 So. 2d 684 (La. 1991).

The sole issue before us is whether a Louisiana court in a Jones Act/general maritime case is required to apply the federal forum non conveniens law.[5]

Forum non conveniens is a doctrine by which a court "may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The doctrine has been recognized in federal admiralty law since at least 1801. *Bickel, The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Admiralty*, 35 Cornell L.Q. 12 (1949). The modern form of the doctrine in federal courts originated in 1947 in the *Gilbert* case, and this federal doctrine has been adopted by thirty-two states and the District of Columbia. Robertson & Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937, 950 (1990). By contrast, Louisiana courts have refused to apply the common law doctrine of forum non conveniens, finding it "foreign to our jurisprudence." *Trahan v.*

---

[5] We note at the outset that the facts of the instant case would not present an issue of forum non conveniens for the federal courts, since they could transfer (as opposed to dismiss for forum non conveniens) the case pursuant to 28 U.S.C. § 1404(a):

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Our state courts have no such mechanism to transfer the case out of the state; and their only option is dismissal of the case. Thus, the question before us is one of dismissal for forum non conveniens, not transfer.

Phoenix Insurance Co., 200 So. 2d 118 (La. App. 1st Cir. 1967). After *Trahan*, the legislature enacted article 123 of the Code of Civil Procedure. That article, in its present form, provides:

> **Art. 123. *Forum non conveniens.***
>
> A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.
>
> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and in the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 USC § 688 [the Jones Act] of federal maritime law.
>
> [Emphasis added].

Louisiana courts may not dismiss cases for forum non conveniens except as provided in this article. *Fox v. Board of Supervisors*, 576 So. 2d 978 (La. 1991).

A clear reading of article 123(c) leads to the conclusion that the doctrine of forum non conveniens is specifically made unavailable in a Jones Act or maritime law case. That was the holding of this court in *Markzannes v. Bermuda Star Line*, 545 So. 2d 537 (La. 1989) (per curiam), *cert. denied*, 110 S.Ct. 837 (1990), and the court of appeal in *Kassapas v. Akron Shipping Agency, Inc.*, 485 So. 2d 565 (La. App. 5th Cir. 1986), *writ denied*, 488 So. 2d 203 (La. 1986), *cert. denied*, 479 U.S. 940 (1986). However, the lower courts in the instant case chose not to rely on those precedents, finding instead that the doctrine of forum non conveniens is a "characteristic feature of the general maritime law" governed by federal, rather than state law. In support, the court of appeal cited the federal Fifth Circuit's opinions in *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990), and *Exxon Corp. v. Chick Kam Choo*, 817 F.2d

307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988).

As a general proposition, a maritime claim brought in state courts is governed by the same principles as govern actions brought in admiralty, i.e., federal maritime law. *Green v. Industrial Helicopters*, 91-C-0859 c/w 91-C-0860 (La. Jan. 21, 1992) (citing *Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063, 1065 n.5 (5th Cir. 1981)). However, it is well settled that a state court, having concurrent jurisdiction with the federal courts as to in personam admiralty claims, is free to adopt such remedies, and to attach to them such incidents as it sees fit so long as it does not attempt to make changes in the substantive maritime law. *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924); *Lavergne v. Western Co. of North America*, 371 So. 2d 807 (La. 1979). Thus, the focus of our inquiry must be whether the doctrine of forum non conveniens is a fundamental feature of admiralty law, such that our contrary state law rule would be preempted.

Although the United States Supreme Court has yet to address the doctrine of forum non conveniens in a Jones Act/admiralty case, we find that the Court has addressed the doctrine in the context of the Federal Employers' Liability Act (FELA). In *Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950), the Supreme Court addressed the issue of whether Missouri could apply its forum non conveniens rule in the context of a FELA claim brought in a Missouri state court. In finding that the state rule could apply, the Court stated:

> According to its own notions of procedural policy, a State may reject, as it may accept, the doctrine [of forum non conveniens] for all causes of action begun in its courts. If denial of a motion to dismiss an action under the Federal Employers' Liability

> Act is rested on such a general local practice, no federal issue comes into play.
>
> 740 U.S. at 3.

Since the Jones Act is based upon and incorporates by reference the FELA, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), we find this case persuasive in the matter before us.

Likewise, we find it instructive to look to the decisions of the federal courts sitting in diversity actions. Under *Erie v. Tompkins*, 304 U.S. 64 (1938), the federal courts in diversity actions must apply state substantive law and federal procedural law. In *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987), *vacated on other grounds and remanded*, 109 S.Ct. 1928 (1988), *reinstated in pertinent part*, 883 F.2d 17 (5th Cir. 1989), the court was faced with the issue of whether to apply the state or federal forum non conveniens law in a diversity action. The court held that a federal court in diversity was required to apply the federal forum non conveniens la

> We hold that the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important that the disruption of uniformity created by applying federal forum non conveniens in diversity cases.
>
> 821 F.2d at 1159.

The Eleventh Circuit reached a similar result in *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985), finding that forum non conveniens was not a part of the state substantive law for *Erie* purposes:

> The forum non conveniens doctrine is a rule of venue, not a rule of decision . . . In contrast, "rules of decision" are the "substantive" law of the state, the "legal rules [which[determine the outcome of a litigation." [citation omitted].
>
> 757 F.2d at 1219.

Under the so-called "reverse-Erie" doctrine approved by the Court in *Offshore Logistics v. Tallentine*, 477 U.S. 207, 223 (1986), these cases suggest that the forum non conveniens doctrine should not be considered part of the substantive federal admiralty law in a "saving to suitors" case, any more than the doctrine is part of the state substantive law for *Erie* purposes. *See* Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. of Mar. L. & Com. 185, 199 (1987). Further, the interests of self-regulation, administrative independence, and self-management which have influenced the federal courts to apply federal forum non conveniens in diversity cases are equally applicable to the Louisiana's interest (as expressed by our legislature in La. Code Civ. P. art. 123) in applying the state forum non conveniens rule in Jones Act/general maritime cases.

Turning to the facts of the present case, we see nothing which would lead us to believe the application of our state forum non conveniens rule deprives the litigants of a substantive right under the federal maritime law. Clearly, application of our state rule will not be outcome determinative of the case, since the law of the case (Jones Act and general maritime law) will be identical, whether the case is heard in Louisiana or Pennsylvania.[6]

---

[6] In theory, forum non conveniens should never be outcome determinative. For example, if federal choice of law principles mandated that Greek law applies to a case, both a Louisiana court and a federal court

Louisiana has jurisdiction over the case, and Louisiana courts have an interest in the matter, since defendant has done work in the state in the past and maintains an agent for service of process here. Thus, the only interest of defendant affected by the application of our state procedure is one of convenience. We find this interest by itself does not rise to the level of a substantial right.

In sum, we find that the doctrine of forum non conveniens is not a substantive feature of the general maritime law. Accordingly, we find application of Louisiana's forum non conveniens rule is not preempted by federal admiralty law. Since our procedural rule precludes dismissal of this Jones Act/general maritime case on the ground of forum non conveniens, the lower courts erred in holding otherwise.

---

would apply Greek law, although the federal court would have the option of dismissing the case under forum non conveniens to allow it to be re-filed in Greece. Nonetheless, the law of the case, whether applied by a Louisiana court, a federal court, or a Greek court would be Greek law. In practice, however, a forum non conveniens dismissal can be outcome determinative in one unique situation: where federal choice of law principles determine that American law applies, but where there is no realistic chance that a foreign court would apply American law to the case. Edelman, Forum Non Conveniens: Its Application in Admiralty Law, 15 J. of Mar. L. & Com. 517, 530 (1984). The federal circuits have split on whether such a case may ever be dismissed on forum non conveniens. The Ninth, Tenth, and Eleventh Circuits have refused to dismiss cases for forum non conveniens if American law (i.e., the Jones Act), applies. *See Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481 (10th Cir. 1983); *Szumlicz v. Norwegian American Lines, Inc.*, 698 F.2d 1192 (11th Cir. 1983). *See also LaSerguridad v. Transytur Line*, 707 F.2d 1304, 1310 n.10 (11th Cir. 1983). By contrast, the Second Circuit in *Cruz v. Maritime Co. of*

DECREE

For the reasons assigned, the judgment of the court of appeal is reversed. The exception of forum non conveniens is overruled. The case is remanded to the district court for further proceedings in accordance with law.

Philippines, 702 F.2d 47 (2d Cir. 1983), found that the doctrine of forum non conveniens applied to a Jones Act case. The Fifth Circuit initially agreed with the majority view, and held a federal court was required to retain jurisdiction in a Jones Act case. *See Nichol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289 (5th Cir. 1984). However, in *In Re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 n. 25 (5th Cir. 1987), *vacated on other grounds and remanded*, 109 S.Ct. 1928 (1988), *reinstated in pertinent part*, 883 F.2d 17 (5th Cir. 1989), the court in a footnote to a non-Jones Act case disapproved its prior line of cases and applied forum non conveniens to Jones Act cases.

By not allowing for any forum non conveniens dismissals, our state law rule avoids ever creating a situation where the dismissal may be outcome determinative. We also note that our state rule is in accord with the majority of the federal circuits.

CERTIFICATE OF SERVICE

I, the undersigned counsel of record for petitioner, American Dredging Company, do hereby certify that three copies of this Joint Appendix were served on respondent, William R. Miller, Sr., through his counsel of record delineated below by placing them in a sealed envelope with postage fully pre-paid in a United States Post Office mail box at New Orleans, Louisiana, addressed as follows:

Timothy J. Falcon, Esq.
Attorney at Law
500 Verret St.
New Orleans, LA 70114-1055
Counsel for Respondent

All parties required to be served have been served.

I declare, under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of June, 1993.

Thomas J. Wagner*
Whitney L. Cole
336 Camp Street
C & R Building, Suite 250
New Orleans, Louisiana 70130-2804
Telephone: (504) 525-2141
and
WAGNER & BAGOT
*Counsel of Record for Petitioner